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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Petitioner,

vs.

JOHN ROCK, Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND/OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF FOR PETITIONER.

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JAMES L. HETLAND,
Of Counsel.

INDEX.

Subject Index.

	Page
Reply brief for petitioner:	
I. Jurisdiction	1
II. Miscellaneous	4

Table of Cases Cited.

Kenna v. Calumet Ry., 306 Ill. App. Ct. Repts., 17, 44	2
Reivitz v. Chicago Rapid Transit, 327 Ill., 207	3
Soden v. Claney, 269 Ill., 98	3
United States v. Carver, 260 U. S., 482	3

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JOHN ROCK, RESPONDENT.

REPLY BRIEF OF PETITIONER.

(After allowance of writ.)

I.

Jurisdiction.

The respondent's brief begins with a reargument of the contention that this Court was without jurisdiction to issue the writ of certiorari because the Appellate Court of Illinois was not the highest court of the State in which a decision in this case could be had. We would suppose that this question had been passed on and finally disposed of by this Court when it issued

the writ, at which time it had before it respondent's brief and our briefs, in which the point of lack of jurisdiction was fully argued. In case, however, that question is still open we submit the following.

Respondent's point is that we failed to apply to the Appellate Court, First District, for a certificate of public importance, in addition to seeking a writ of certiorari from the Supreme Court of Illinois to the Appellate Court, and that for this reason we failed to secure a final judgment or decree in the highest court of the State in which such judgment could be had, the Supreme Court of Illinois.

As we previously pointed out, the Appellate Court, First District, in a case analogous to ours under the Federal Employers' Liability Act, Kenna vs. Calumet Ry., 206 Ill. App. Ct. Repts. 17, at page 44, refused to issue a certificate of importance on the ground that application to the Supreme Court of Illinois for a writ of certiorari was the correct procedure. The Appellate Court there stated:

> "This method of review (by certificate of importance) was provided primarily for cases not otherwise reviewable, and while there are exceptions to the general rule, we see no reason why the appellant in the instant case should not make its application to the Supreme Court for a writ of certiorari."

Respondent's present brief makes no answer to the foregoing ruling of the Appellate Court, First District, except to point out that certificates of importance have been granted in four cases, cited at page 7

of respondent's brief, in which damages for personal injuries were claimed. Our reply to this is that only one of these cases, Reivitz *vs.* Chicago Rapid Transit, 327 Ill. 207, was a decision by the First District of the Appellate Court subsequent to the Kenna case, *supra*, and must be assumed to have presented some unusual feature making it one of those exceptions to the general rule the existence of which was recognized in the above-quoted passage from the Kenna case. It is not to be presumed that the Court would have recognized the present case as constituting such an exception.

Moreover, our application to the Supreme Court of Illinois for a writ of certiorari, which was denied, did in effect result in a final judgment or decree of that Court affirming the judgment of the Appellate Court, for, as we pointed out in our reply to respondent's brief opposing the issuance of the writ in this Court, the Supreme Court of Illinois squarely held in Soden *vs.* Clancy, 269 Ill. 98, that while its denial of a writ of certiorari does not necessarily mean an approval of the reasons on which the Appellate Court based its judgment, still—

> "it is an approval of the conclusion reached and, therefore, in effect an affirmance of the judgment."

Respondent's only answer to this consists in referring to the fact that no such significance attaches to a denial of ceriorari by the Supreme Court of the United States, which, as this Court pointed out in U. S. *vs.* Carver, 260 U. S. 482, "imports no expression of opinion on the merits of the case."

Obviously, however, this Court was not there undertaking to explain the significance of a denial of certiorari in some other Court, and the above-quoted statement of the Supreme Court of Illinois conclusively determines what is involved in a denial by that Court of a writ of certiorari, namely, an approval of the conclusion reached by the Court below and in effect an affirmance of the judgment. It plainly follows from this that we did secure a review of this case and in effect a final judgment or decree from the Supreme Court of Illinois. And, of course, such being the case, it is wholly immaterial whether or not we might have secured such a result by following some other method.

II.

Miscellaneous.

On page 8, line 10, of respondent's brief there is a statement that when plaintiff applied the second time to the yardmaster for employment plaintiff "told him he had been rejected as Joe Rock," citing Record 53, 55, 92. An examination of the Record at these points shows that it does not clearly support the quoted statement. The yardmaster clearly testified that he was not informed "that plaintiff had been rejected" (R. 92).

On page 19, line 23, of respondent's brief there is a flat statement that the headlight on the Belt Line locomotive "had not been dimmed," citing Record 24. There is no such direct statement in the Record. At page 24 plaintiff merely testified that the headlight

was "bright," and that it blinded him. Even a dimmed headlight is bright, and obviously blinding to a certain degree.

On page 19, third line from the bottom, of respondent's brief there is a statement that the distance between the track on which the Belt Line train was approaching and that on which the cabooses were moved was about fifteen feet. Application of the scale on the original map in evidence (reproduced on reduced scale opposite page 78 of the Record) shows that the distance between these tracks, center to center, was eighteen feet eight and one-half inches.

On page 20, near the bottom, there is a statement that the conductor in charge of the caboose movement saw plaintiff coming toward the track and "*nevertheless* signaled the engineer to shove the cabooses north." The plain implication that he gave the signal for the movement after he saw plaintiff approaching the track, which is repeated on the next page, is not correct. The conductor testified at Record 212, 213, 215 that he did not see plaintiff until *after* he had given the signal for the movement of the cabooses. Moreover, the Appellate Court did not suggest any negligence on the part of the conductor.

On page 24, line 8, of respondent's brief there is a statement that "there was no regular time for making this caboose movement (R. 35)." Page 35 of the Record does not support that statement. On the contrary, there is direct testimony at Record 237 that the caboose movement was performed at the "usual" time.

At page 26, last four lines, of respondent's brief there is the following statement:

> "A lookout man upon that caboose could have plainly seen plaintiff in ample time to have prevented the caboose train from starting, to have stopped it after it had started, or to have warned plaintiff of its approach."

He could not have seen plaintiff in time to prevent the caboose movement from starting, because at the time of the starting the Belt Line train was between the two. As for stopping it after it had started, or warning plaintiff of its approach, the conductor who was on the ground in front of the cabooses looking towards them, and who saw plaintiff, was in a position to discharge these functions, as soon as the nature of plaintiff's rash act was appreciated and the need to do so became apparent.

On page 38 of respondent's brief, about the middle, there is a statement that plaintiff did not know that these cabooses would be moved as they were, to which we reply that he testified explicitly that he knew they *might* be so moved (R. 36), and that this is sufficient to charge him with assumption of risk under the rule in the Aerkfetz case where this Court found it sufficient that the injured man knew that cars "were *liable* to be shunted without warning to him." (Italics ours.)

On page 39 of respondent's brief, it is argued that plaintiff was justified in crossing in front of the Belt Line train in order to avoid an extremely long delay in waiting for it to pass when he was almost due back at his work. No answer, however, is offered to the more important question as to why plaintiff did not

pause in a position of safey after he had crossed in front of the Belt Line train, until he could see where he was going, instead of rushing across more tracks in a blinded condition.

Respectfully submitted,

HENRY S. MITCHELL,
Counsel for Petitioner.

Office Supreme Court, U. S.
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IN THE

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Petitioner.

vs.

JOHN ROCK,
Respondent.

Reply to Petition for Writ of Certiorari.

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CHURCHILL LAW PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
The petition should be dismissed for want of jurisdiction	1
The relation of master and servant existed between the respondent and the petitioner	3
The question of assumed risk was properly submitted to the jury	13
Petitioner was guilty of negligence	13

AUTHORITIES CITED.

	PAGE
American Car & Foundry Co. v. Armentraut, 214 Ill. 509	11
Baker v. Beattie, 222 S. W. 658	10
Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385 (Affirmed, 241 U. S. 211)	27
Cahill's Revised Statutes of Illinois, Section 120, Chapter 110	1
Central Railroad Company of New Jersey v. Colasurdo, 192 Fed. 901	22
Chesapeake & Ohio R. R. Co. v. De Atley, 241 U. S. 310	20, 23
Delaware, L. & W. R. Co. v. Hughes, 240 Fed. 941	29
Denver R. G. R. Co. v. Reiter, 47 Col. 417, 107 Pac. 1100	10
Engel v. C. B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523	23
Fisher v. Perkins, 122 U. S. 522	2
Frazier v. Interstate Railroad Co., 264 Fed. 96	28
Gila Valley, etc., Ry. Co. v. Hall, 232 U. S. 94	21
Grand Trunk Railroad Co. v. Ives, Admr., 144 U. S. 408, 417	30

Gregory v. McVeigh, 23 Wall. 295 3
Indiana, Illinois & Iowa R. R. Co. v. Otstot, 212 Ill. 429 24
Lake Shore and M. S. R. Co. v. Baldwin, 19 Ohio C. C. 338 9
Lupher v. Atchison, T. & S. Fe Ry. Co., 81 Kan. 585, 106 Pac. 281 ..... 8, 12
Matlock v. Williamsville, etc., Ry. Co., 198 Mo. 495, 95 S. W. 849 10
Payne, Director General v. Daughtery, 283 Fed. 353 6
Philadelphia B. & W. R. Co. v. Tucker, 35 App. D. C. 123 (Affirmed, 220 U. S. 608) 28
Seaboard Air Line v. Horton, 239 U. S. 595 19
Stratton v. Stratton, 239 U. S. 55 3

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Reply to Petition for Writ of Certiorari.

I.

THE PETITION SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

The Appellate Court of Illinois was not the highest court of the State of Illinois in which a decision in this case could be had.

Section 120, Chapter 110, Cahill's Revised Statutes of Illinois, provides as follows:

> "In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court

or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in said Appellate Courts it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court: * * *"

The complete record in this case discloses that no certificate of importance was ever asked for or denied in the Appellate Court of Illinois. That court had before it the entire record of the proceedings, and it might have granted a certificate of importance, in which event the Supreme Court of Illinois would have taken the case and passed judgment upon it. The defendant did, however, petition the Supreme Court of Illinois for a writ of certiorari. The petition was denied, and the court never took the case for review and determination. Petitioner, therefore, did not, in accordance with Section 237, Volume 43, Par. I, United States Statutes at Large, page 937, exhaust in the state courts the means at hand for obtaining "a final judgment or decree * * * in the highest court * * * in which a decision in the suit could be had, * * *"

In *Fisher* v. *Perkins*, 122 U. S. 522, under like circumstances, it was held:

> "The want of a certificate is good reason for refusing to allow an appeal, but until it has been asked

for and refused, its absence furnishes no ground for a writ of error from this court."

"As it is, we find nothing in the record to show that the suit could not have been taken to the Court of Appeals if the necessary application had been made, and, consequently, we have no right to proceed. * * * The judgment is still the judgment of the Superior Court, which is not the highest court of the state, and it might have been taken to the Court of Appeals for review if the grant of an appeal had been applied for and secured."

Although the defendant took one and not the other of two courses open to it and filed its petition for writ of certiorari in the Supreme Court of Illinois, still the judgment against it might have been taken to the Supreme Court of Illinois for review if the Appellate Court of Illinois had been asked to and had granted a certificate of importance in the cause. Everything was not done that could be done to take the case to the highest court of the State of Illinois.

Gregory v. *McVeigh*, 23 Wall, 294.
Stratton v. *Stratton*, 239 U. S. 55.

If this court should hold that it has jurisdiction to entertain this petition, then in reply to petitioner's brief and argument we submit the following:

II.

THE RELATION OF MASTER AND SERVANT EXISTED BETWEEN THE RESPONDENT AND THE PETITIONER.

We will hereinafter refer to petitioner as defendant and to the respondent as plaintiff.

It is admitted that the plaintiff and the defendant were engaged in interstate commerce at the time of the acci-

dent (R. 21). Regardless of this admission defendant now contends that the relation of master and servant did not exist within the meaning of the Federal Employers' Liability Act, between them, because plaintiff at the time he was employed had another man take the physical examination required by the defendant, this other man representing plaintiff at the time. Plaintiff then went to work as a switchman and continued in that employment for fourteen months prior to the time of the accident which necessitated the amputation of his left leg. In determining whether this misrepresentation by plaintiff prevented the existence of the relation of master and servant under the Federal Act, we call attention to the fact that his physical condition in no way contributed to his injury. The Appellate Court of Illinois specifically states in its opinion that "the defendant concedes in the oral argument that the physical condition of the plaintiff at the time of the accident did not contribute in any way to his injury" (R. 278). From the record it may reasonably be inferred that the defendant's yardmaster, John P. O'Haire, knew when plaintiff made the second application for employment that he was the same man that had applied for work a few weeks before and that he had been rejected because of a rupture and certain other abdominal operations that he had undergone. The Appellate Court sums up the evidence on this question on page 276 of the record as follows:

> "It appears that the plaintiff made two applications for work with the defendant company. In the first he gave his real name and in the second he gave the name of John Rock. The night yardmaster of the defendant testified that on the occasion of the second application he gave the plaintiff a letter to the superintendent in which the plaintiff was named 'John Rock' or 'J. J. Rock'; that everybody called him Joe; that he is known there to this day as Joe Rock; that he put the plaintiff to work as John Rock,

but that he knew he had been called Joe right along. The testimony of the plaintiff is to the effect that when he made the second application the yardmaster knew that he was the same person who had been rejected under the first application. It is clear from the record that the plaintiff in the instant case is the person who sustained the injuries for which the suit was brought. The defendant did not file or offer to file a plea in abatement, and 'a misnomer of the plaintiff can only be pleaded in abatement and is no ground for setting aside the proceedings.' (*Springfield Ry. Co.* v. *Hoeffner*, 175 Ill. 634, 644. See also *Salisbury* v. *Gillett*, 2 Scam. 290; *Moss* v. *Flint*, 13 Ill. 571.)"

From this statement of the evidence by the reviewing court of Illinois it is clear that the defendant's contention in its petition to the effect that there was "a mistake as to the identity of the plaintiff" is unfounded.

Regardless of the foregoing facts it is our position (A) that this first point raised by defendant presents no Federal question for review; and (B) that if we assume that a Federal question is presented, the plaintiff's misrepresentation in securing his employment did not prevent the relation of master and servant from existing between him and the defendant.

(A) No Federal Question is Presented Under Defendant's Point I.

The relation of master and servant is determined by the general law of contracts. There is nothing in the Federal Employers' Liability Act that requires the application of anything other than the general rules of law in determining whether the employee and employer relationship existed in the case at bar. No matter if an employee's right of action is based upon common law, upon a state statute or a Federal statute, the tests and

rules invoked in determining the existence of the relationship are the same. We submit that this contention presents no Federal question and that therefore this court is not called upon to review that phase of the case.

(B) The Relation of Master and Servant Existed Between Plaintiff and Defendant.

If it should be held that the plaintiff's misrepresentation in securing his employment does present a Federal question for review we then contend that if everything in connection with the manner in which his employment was secured is considered, he was nevertheless at the time he was injured, an employee of the defendant within the meaning of the Federal Employers' Liability Act. For fourteen months prior to the accident he had done defendant's work and had received pay for that work. It is conceded that his physical condition in no way contributed to his injury. The night yardmaster, O'Haire, admitted that although he made his second application in the name of John Rock instead of Joe Rock that the only name he was known by in the yard all the time he worked there was "Joe" Rock (R. 91). Could the occurrence of the accident while he was a paid employee of the defendant, work a retroactive dissolution of his contract of employment?

The Appellate Court of Illinois quotes from and follows two cases in which the precise question now urged was decided adversely to the contention raised by the defendant (R. 279, 280). One of these cases is that of *Payne, Director General* v. *Daugherty*, 283 Fed. 353, decided by the United States Circuit Court of Appeals for the Eighth Circuit. It was a suit brought to recover damages for personal injuries sustained by a railroad switchman while at work in interstate commerce. The defendant admitted that the car on which the plaintiff was at work

when injured was defectively equipped and that it was being moved in interstate transportation but denied that plaintiff was its employee, because the proof showed that he had "obtained his position by fraudulent misrepresentations of his former employment and concealing prior injuries, that he was a victim of epilepsy, to which his fall was attributed in whole or in part * * *." In affirming a judgment for the plaintiff the court said, Opinion 354:

> "(1) A principal contention, embraced in a number of assignments, is that the trial court erred in excluding evidence offered to defeat the action, on the ground that the plaintiff fraudulently secured his employment, as pleaded, and in refusing instructions tendering such defense. In our opinion, the rulings were correct. The complaint is not that proof is incompetent which tended to attribute the fall from the car to prior injury or affliction. That is far different from permitting a retroactive dissolution of the relation of master and servant, by virtue of the contract, which, even if voidable, was, while it subsisted, attended with the duty, required by law, for the safety of the latter. Cases are cited involving different facts, but of contrary import in principle. We regard the decisions such as *Lupher v. Atchison, T. & S. F. Ry. Co.*, 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N. S.) 707, as declaring the sound and just rule, namely, that there is liability to the employee, notwithstanding the inducement to the contract. Furthermore, this action was brought under the federal Employers' Liability Law (35 Stat. 65 (Comp. St. Secs. 8657-8665)) and the fault of the defendant was alleged under the Safety Appliance Acts (27 Stat. 531; 32 Stat. 943 (Comp. St. Secs. 8605-8615)). And in our opinion we should hold that the defense urged was not available, in view of the positive terms of sections 1 and 5 of the former act. See *Phila., Balt. & Wash. R. R. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911;

Chicago & Alton R. Co. v. *Wagner*, 239 U. S. 452, 36 Sup. Ct. 135, 60 L. Ed. 379; *Spokane & Inland R. R.* v. *Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125."

Another case cited by the Appellate Court is that of *Lupher* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 81 Kan. 585, 106 Pac. 284. There it appears that the plaintiff obtained his position by misrepresenting his age when he applied for work. A rule of the company forbade the employment of minors as brakemen and plaintiff, eighteen years of age, knew that, and that he could not obtain employment unless the defendant believed he was twenty-one. After working several months he was injured and brought suit to recover damages therefor. As in the case at bar, plaintiff's own testimony disclosed all of these facts. At the close of all the evidence the trial court directed a verdict for defendant "upon the ground that his misrepresentations in securing his employment prevented the establishment of the relation of master and servant, and that at the time of his injury he was either a trespasser or at most a mere licensee to whom the company owed no other duty than not to injure him wrongfully or wantonly." The Supreme Court of Kansas reversed this ruling of the trial court and in so doing after pointing out that the case of *Fitzmaurice* v. *N. Y. etc. R. R. Co.*, 192 Mass. 159 (relied upon by defendant in the instant case) was not analogous on the facts, said:

> "• • • the seeker of employment does, it is true, procure his contract by false representations, but having obtained it, he begins the performance of service for the benefit of the company, and renders it an equivalent for all that he receives from it. True, the company could at its option, upon discovery of the deceit, discharge him at any moment (26 Cyc. Law & Proc. p. 989), but even then he would be

entitled to compensation for the time he had served, not necessarily at the agreed rate, but according to the reasonable value of his services. *Anstee* v. *Ober*, 26 Mo. App. 665. *The relation of master and servant exists in virtue of the one party performing valuable services which are accepted and paid for by the other.* If Lupher had arrived at full age before the accident occurred, it would hardly be contended that he was still a trespasser. Yet he would still have been working for the company under a contract he had obtained by misrepresentation. The difference would be that his arrival at majority would have rendered it absolutely impossible that any injury should result to the company from the deception."

A similar proposition was before the court in *Lake Shore & M. S. R. Co.* v. *Baldwin*, 19 Ohio C. C. 338, where the court said (Opin. 341):

"A large number of cases have been cited where it was held that persons wrongfully upon trains were trespassers, and not entitled to the protection of the railroad company, and learned counsel for the railroad company insist with great vigor and earnestness that, under the state of facts in this case, Baldwin was a trespasser and wrongdoer; that he procured his employment in the service of the railroad company by false pretense; that he was wrongfully upon the train where he was injured; that, being a wrongdoer and trespasser, the company owed him no duty to provide a safe place for him to work and safe appliances and machinery to do his work. * * * The rule of the railroad company requiring its employees to be twenty-one years of age is a reasonable one, but we cannot agree with counsel that the false statement of Glenn Baldwin as to his age made him a trespasser upon the cars and tracks of the railroad company * * *. Putting it as strongly as counsel for the company can put it, that he falsely represented his age to the company,

> and colluded and connived with George Davis to deceive the company, we still think that, while he was in the actual service of the railroad company, he was entitled to the protection of an employee. The fact that he had misrepresented his age, and the further fact that he was a minor, did not make the contract for service void, but voidable. The railroad company, having been deceived, on the other hand, could terminate it whenever it discovered the deception; but, until one party or the other put an end to the relations, the contract continued to exist."

In *Baker* v. *Beattie*, 222 S. W. 658, the Texas Court of Civil Appeals held that the fact that an injured switchman had made false statements in his application for employment as to his age and as to prior injuries he had sustained did not make void his contract of employment so as to destroy the relation of master and servant.

In *Matlock* v. *Williamsville, etc. Ry. Co.*, 198 Mo. 495, 95 S. W. 849, the Supreme Court of Missouri held that the fact that plaintiff's intestate fraudulently represented himself to be of age in order to obtain his employment and that such representation was believed by the defendant, constituted no defense in a suit brought for damages for his wrongful death.

In *Denver R. G. R. Co.* v. *Reiter*, 47 Colo. 417, 107 Pac. 1109, it was held that although a railroad brakeman had deliberately made fraudulent representations as to his age in order to obtain the employment at which he was at work when injured, nevertheless, "the law is well settled" that the plaintiff by such misrepresentations, believed and relied upon by the employer, was not "thereby barred from a recovery for injuries which he may suffer from the negligence of his employer * * *."

The courts of Illinois have repeatedly held that although a minor misrepresents his age in order to obtain

employment, such misrepresentation is not a bar to an action brought to recover damages for injury sustained while such minor is at work under a contract of employment so obtained. It was so held in *American Car & Foundry Company* v. *Armentraut*, 214 Ill. 509.

Defendant cites *Stafford* v. *B. & O. R. R. Co.*, 262 Fed. 807 and a Virginia case,—*Norfolk & Western Ry. Co.* v. *Bondurant*, 107 Va. 515. The *Stafford* case was not decided by a reviewing court, but by a district judge on the plaintiff's motion to strike out defendant's special plea setting up the fact that Stafford had secured his employment much as plaintiff did in the case at bar. Plaintiff by this motion contended that the matters set up in the plea had no proper place in determining his rights. The trial court overruled the motion to strike saying that "a number of questions, such as consent to the substitution (*i. e.*, having someone else take the required physical examination) for example, might arise on trial that could not be determined in advance on this motion to reject the plea." The trial court thought that defendant should be permitted to show all the facts connected with the manner in which plaintiff obtained his employment when the case was called for trial and for that reason allowed the plea to stand. This *Stafford* case did not, therefore, hold that the fraudulent act of Stafford in having a substitute take the physical examination necessary in order that he might obtain employment himself, prevent the relation of master and servant from existing between Stafford and the defendant company at the time he was injured.

The case of *Norfolk & Western Ry. Co.* v. *Bondurant*, 107 Va. 515, does sustain the defendant's contention in the case at bar. If that case is studied it will be observed that it is based upon the decision in *Fitzmaurice* v. *N. Y. etc. R. R. Co.*, 192 Mass. 159, now relied upon by

defendant. The facts in the *Fitzmaurice* case, so wholeheartedly adopted by the Supreme Court of Virginia, are in no way analogous to the facts in the *Bondurant* case, or to the facts in the case at bar. Fitzmaurice was a passenger on defendant's road and admitted making fraudulent statements in order to obtain a ticket which but for her fraud would not have been sold to her. The distinction between the *Bondurant* case and the *Fitzmaurice* case is well stated by the Supreme Court of Kansas in the case of *Lupher v. Atchison, T. & S. Fe Ry. Co.*, 81 Kan. 585, as follows:

> "The substance of the Massachusetts case is that one who uses a railroad ticket obtained at a reduced rate by fraudulent representations is not a passenger in the sense of being entitled to protection as such, and stands in no better position than a mere trespasser. This is the general doctrine, to which there seems to be no dissent. 6 Cyc. Law & Proc. p. 538. The Virginia court took the view that, by parity of reasoning, one who obtains employment from a railway company by a false statement as to his age is prevented by his fraudulent act from becoming an employee. We think the two situations are obviously dissimilar. The analogy is not close enough to warrant the application of the same rule. Among other differences may be noted this: In the one instance a person desiring to be transported from one point to another fraudulently procures the railway company to render him that service, a service which is wholly for his benefit, and in which the company has no interest whatever. He obtains by false pretenses something of value to himself for which he renders no equivalent. In the other the seeker of employment does, it is true, procure his contract by false representations, but, having obtained it, he begins the performance of service for the benefit of the company, and renders it an equivalent for all that he received from it."

Under the foregoing decisions we submit that the relation of master and servant existed in the case at bar between the plaintiff and defendant and that plaintiff's status at the time he was injured was that of an employee under the provisions of the Federal Employers' Liability Act.

III.

PLAINTIFF DID NOT ASSUME THE RISK. THAT QUESTION WAS PROPERLY SUBMITTED TO THE JURY.

DEFENDANT WAS GUILTY OF NEGLIGENCE THAT PROXIMATELY CAUSED PLAINTIFF'S INJURY.

Defendant contends under Point II that the plaintiff assumed the risk of his injury and under Point III that defendant was not guilty of negligence that proximately caused or contributed to cause the injury. It is necessary in considering these two questions to review the evidence bearing upon these issues. We will make this review of the evidence at this point and later under Points A and B cite the cases applicable on each proposition.

Defendant's Exhibit No. 1 (R. 78) is a diagram showing the place of the accident. Irving Park boulevard, there shown, was a much traveled east and west public street and highway in the City of Chicago. Plaintiff was injured while crossing the tracks on a well defined pathway about 75 or 100 feet north of this public street. At this place there were two main line tracks and two lead tracks (R. 78, Diagram Deft. Ex. 1). The accident did not happen in a switching yard proper. Trains were broken up and made up and cars were shunted in onto various classification tracks about a mile farther north at Lawrence avenue, the south end of these various classification tracks being some two or three hundred

feet north of Irving Park boulevard (R. 20). At the south end of the yard and just north of Irving Park boulevard where the accident happened, cabooses were occasionally moved in along the lead tracks in order to be placed in upon the south end of trains that had been made up on the various switching tracks by the switching crews working from the north end of the yard at Lawrence avenue. Transfer trains and other trains frequently passed over the main tracks and the two lead tracks at the place of the accident. Trains were not made up or broken up, however, at the south end of this yard (R. 71; R. 21).

On the day of the accident plaintiff and his crew had been working from 3 o'clock in the afternoon up at the north end of the yards switching cars and making up trains. About 8:30 or 9 o'clock in the evening they came with the switch engine from the north end of the yard at Lawrence avenue down to a point near the depot just north of Irving Park boulevard, where their engine was left standing on the east side of the tracks while they had their lunch (R. 21). They had twenty minutes in which to eat and get back to work (R. 22). Some of the crew went into the depot while plaintiff went from the engine standing on the east side of the four tracks near the depot, shown in the diagram as Defendant's Exhibit I (R. 78), west, across the tracks to have his lunch. He was there about fifteen minutes and on his way back stopped at the oil house on the west side of the tracks north of and near to Irving Park boulevard to fill his lantern (R. 22). After filling and lighting his lamp he started east to go across the tracks back to his engine, still standing on the west side of the tracks. His twenty-minute lunch period was about up and when he got near to the most westerly track he saw a long freight train at about Irving Park boulevard

coming north toward him at about three miles per hour (R. 24). The headlight on the locomotive had not been dimmed, contrary to the custom and practice in entering and moving through the yard. Plaintiff, seeing this long train of about eighty cars (R. 31) coming at about three miles per hour, and knowing that his crew would be delayed unless he went across the tracks ahead of it, started to do what any ordinarily prudent person would do under the circumstances, namely, get back to his work rather than stand idly by while this eighty-car train passed him. He crossed this most westerly track about 75 feet ahead of this incoming transfer train. He had ample time to cross and did cross in front of it. It was about fifteen feet from the track on which the freight train was approaching to the track next east of it (R. 24). After crossing this track on which the train was coming, he looked both north and south but could not see anything coming from either direction (R. 24). As he looked to the south, after crossing this first track, the bright headlight on the locomotive pulling the train upon the first track so blinded him that he did not and could not see some cabooses coming from the south upon the second track until they were about ten feet away from him (R. 24, 25). He was struck by these cabooses and dragged a distance of about thirty or forty feet and injured (R. 25).

There was no light upon the caboose train that struck him and no man riding it as a lookout and there was no warning of its approach given by engine bell, whistle or otherwise (R. 25). These cabooses attached to the locomotive that shoved them to the north *had been standing still* about one hundred and twenty-five feet north of Irving Park boulevard on this second track (R. 213). They did not move over twenty feet before striking the plaintiff (R. 215), and they were started from where

they had been standing without any kind of signal or warning whatsoever.

Defendant's conductor admitted that he saw the plaintiff cross the first track in front of this oncoming train but that he nevertheless signaled the engineer to shove the cabooses north on the next track over which plaintiff had to cross and "gave no signal at all of any kind" except to so move them, "from the time he saw that man until he was hit" (R. 213, 214). He gave no signal to stop the cabooses until "the man went behind the cabooses; that was right when he got on the track" (R. 214).

The place where plaintiff crossed was a well defined and much traveled way leading from the depot on the east side of the tracks over to the oil houses, the ice house, the restaurant and the switchmen's shanty on the west side of the track. Yardmaster O'Haire admitted that it was a fact that hundreds of workmen crossed there right along every week from day to day (R. 86). Defendant's engineer testified that switchmen, railroad men and car repairers crossed that track day and night from the oil houses across to the depot and that he had seen them do it hundreds of times before this accident (R. 136).

Defendant's conductor testified that switchmen and other employees crossed and recrossed the tracks where plaintiff was hurt right along and that he knew men were apt to be passing there at any time (R. 216). He said that "there was no light in this caboose until after this accident" (R. 217), and that the crew in making this move with the cabooses "generally shove them in or kicked them in and have a man ride them in" (R. 218), but claimed that the man usually rode the south end of the caboose rather than the north end as they moved

north. He testified that in making up trains the cars were shoved in from the north end of the yard (R. 219), that being several blocks north of the place where the accident occurred.

Defendant's witness Banning testified that it was the custom and practice in making the movement in question for a man to ride the car or caboose in onto the switch track (R. 159); that at a place where it was known that dozens of employees crossed the tracks at all hours of the day and night it was the custom and practice to have a man on "the hind end looking out" (R. 160).

Another switchman called by defendant testified that he had made similar switching movements with cabooses at the place in question and that the employees of the defendant crossed the tracks there at the place of the accident right along (R. 242); that in switching these cabooses in as they were doing when Rock was hurt, they kept a lookout on them where these men crossed and re-crossed, from the depot over to the oil house and the eating house (R. 247).

Two witnesses called by the plaintiff testified that they had assisted in making similar switching movements with cabooses over this same track and that in shoving in over the lead track where the accident happened it was the custom and practice for a man to be on the leading car with a light (R. 60, 69). These same witnesses also testified that it was a general custom and practice to dim the headlight on locomotive engines entering and moving through the yard (R. 59, 68). The defendant does not contend that this was not the general custom and practice as to the locomotive headlights.

Plaintiff testified that the headlight on the locomotive pulling this train in front of which he crossed just before being hit by the cabooses that were started up and moved

north on the next track, was not dimmed and that its rays prevented him from seeing these cabooses as they started from a standing position twenty to thirty-five feet away from the point where they struck him (R. 24). He is in effect corroborated by the fireman on the transfer train, who testified that as he rode north upon this north-bound engine in front of which plaintiff crossed, he saw the plaintiff about one hundred and fifty feet west of the track on which his train was running (R. 145). He further testified that it was a dark night and when asked how he could see plaintiff that distance west of the track he said that "a bright light would light it up as clear as day" (R. 145). There were no artificial lights near these tracks (R. 31) and the only bright light that could have enabled him to see the plaintiff was the bright headlight on the locomotive engine upon which he was riding and which plaintiff testified had not been dimmed.

With these facts in mind, did plaintiff assume the risk of injury as a matter of law or was that question properly submitted to the jury?

(A) The Law on the Question of Assumed Risk.

Much of the argument advanced by defendant confuses the doctrine of assumed risk with that of contributory negligence. If plaintiff, seeing this approaching train with the locomotive headlight undimmed, acted carelessly in crossing in front of it, such conduct on his part would amount to contributory negligence only and the assumed risk doctrine would not apply. He certainly was aware of the defendant's negligence in failing to dim the headlight, but he did not know and he was not called upon to anticipate that there would be a negligent movement of a locomotive with cabooses attached to it on the next track. He had no knowledge that the defendant would start and move these cabooses that had been stand-

ing there attached to a locomotive engine, without ringing the bell or without having a light upon the foremost caboose and a man riding it to give warning to employees who habitually crossed there at all hours of the day and night. The burden of proving that plaintiff *knew and appreciated* the danger to be incurred on the track upon which he was hit was upon the defendant under the governing decisions of this court in construing the Federal Employers' Liability Act.

This court has repeatedly held that before a plaintiff can be barred on the ground of assumed risk as a matter of law, the danger to him must have been so *imminent* and *immediately threatening* that no reasonably prudent man under the same circumstances and conditions would have confronted it. In *Seaboard Air Line* v. *Horton*, 239 U. S. 595, it appears that Horton was an engineer operating a locomotive used in interstate commerce. There was a defective guard glass on the water guage of this locomotive. He reported the defect and was told by his superior that it would be repaired as soon as a new glass could be obtained. Nevertheless, knowing that the guage might explode and injure him at any minute, he continued to run the engine for about one week when the guage did explode and injure him because of the absence of the guard glass. In the case at bar there is no such thing as a promise to repair but in affirming a judgment in favor of Horton the rule applicable in assumed risk defenses was announced, the court saying that "The danger must be imminent—immediately threatening—so as to render it clearly imprudent for him to confront it, even in the light of duty, pending the promise."

In the case at bar can it be said as a matter of law that the danger to plaintiff in crossing these tracks as he did was so *imminent* and so *immediately threaten-*

ing that a reasonably prudent man would have remained away from his work and his crew awaiting him while a train of eighty cars moving at three miles per hour passed him? Figuring the average length of a car as forty to forty-five feet (R. 229), this approaching train of eighty cars was over a half mile long. All the witnesses agree that it was moving from three to five miles an hour. It would have taken over a half hour for this train to have passed. Plaintiff's twenty minute lunch period was about up and it cannot reasonably be said that he failed to do what an ordinarily prudent employee would have done in crossing in front of this oncoming train with the undimmed locomotive headlight which did not endanger him and which would have delayed him a half hour if he had waited for it to pass. He had no reason to believe that there was a locomotive engine with cabooses coupled to it standing on the next track that would start up without signal or bell and without a light or a lookout upon the foremost one. They offered no danger while standing there and if the bell on the engine that shoved them north had sounded or any lookout at all had been kept, as plaintiff had a right to assume would be done in accordance with the usual custom and practice as shown by the evidence, the accident would have undoubtedly been avoided.

In *Chesapeake & Ohio Railroad Company* v. *De Atley*, 241 U. S. 310, the plaintiff in the line of his duty was required to board a moving train, and defendant's engine men knew that he was obliged to get aboard as it passed him. On appeal in this court the Railroad Company contended that he assumed the risk of injury in getting on the train and that if it was "moving slowly the risk is an ordinary one incident to the business of railroading; while if it is moving rapidly, the risk is

open, obvious and apparent." This court passing on the case said on page 317 of the opinion:

> "We are unable to concur in the view that there was no question for the jury. Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive, and appreciated the extraordinary danger; or, if not, then upon whether the undue speed and the consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them. * * *."

In *Gila Valley, etc., Ry. Co.* v. *Hall*, 232 U. S. 94, the facts show that the plaintiff was injured by reason of a defective third wheel, or pony wheel on a three-wheeled railway gasoline car called a track velocipede. The defect in the flange of the pony wheel was in plain sight and because of it the car was derailed and the plaintiff injured. There was no promise to repair made by defendant or peremptory order to the plaintiff to use this car. In affirming a judgment for the plaintiff this court stated that a verdict "could not properly have been directed for defendant upon the ground that plaintiff, in using the car, had assumed an obvious risk * * *." In the course of the opinion it was said (page 100):

> "Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known)

of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances would have appreciated it."

Further in the course of the opinion it appears that the defendant had asked the trial court to give an instruction to the effect that it was the duty of the plaintiff to exercise ordinary care to have discovered this defect, and that if he had not done so he should be held to have assumed the risk. The Supreme Court said that the instruction asked was properly refused and that the one given in which it was said that,

> "*The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him.* An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances,"

was a correct statement of law.

In *Central Railroad Company of New Jersey* v. *Colasurdo*, 192 Fed. 901 (dismissed by plaintiff, 226 U. S. 617), the evidence showed that the plaintiff was at work in the night time repairing a switch in defendant's terminal yards, and that he was injured when struck by certain unlighted cars, as they were kicked back along the track without warning. In affirming judgment for plaintiff, the court refused to hold that although plaintiff knew cars might be moved over this track, he assumed the risk of such movement being made without warning. The court said:

> "We cannot believe that the risk of being injured in this manner, while engaged in discharging

his duty, was assumed by the plaintiff. He assumed the usual and ordinary risks of the calling, but when ordered to repair a track at night he had a right to assume that some precaution would be taken to guard him against extraordinary danger. If a watchman were not stationed to warn him of the approach of trains, he at least had a right to expect that a train would not back down upon him with no notice of its approach and no attempt to apply the brakes until only eight feet distant."

The Supreme Court of Nebraska, in *Engel* v. *C. B. & Q. R. R. Co.*, 111 Neb. 21, 195 N. W. 523, following the rule announced in *Chesapeake & Ohio Railroad Co.* v. *DeAtley*, 241 U. S. 310, affirmed a judgment in favor of the administratrix of a deceased railroad employee under facts very similar to those in the case at bar. Plaintiff's intestate was employed as a brakeman in the defendant's yards, and was while so employed, struck by a locomotive engine backed along one of the tracks. The court found from the evidence that the defendant and its employees on the locomotive "knew that deceased and the gang of men under him were constantly crossing and re-crossing the tracks at the place where the accident occurred, and that locomotives were traveling backward and forward on the many tracks in the yard; and that the deceased in doing such work, knew that the tracks were a place of danger at all times." As in the case at bar, no warning of the approach of the engine was given, and no one on it saw the plaintiff. The court in affirming the judgment, said (Opin. 32):

"It cannot be successfully contended that deceased assumed by his employment any injuries which were liable to result from the negligence and carelessness of defendant or its employees. The employee's assumption of risk only applies to the dangers incident to and arising out of the condi-

tions of the machinery, premises and his employment. It was the duty of deceased to watch for dangers and protect himself against them, if possible, and to exercise great vigilance in looking out for approaching engines and trains, but it was also the duty of the railroad company and its employees to use due care and caution for the safety of the employees; and where a railroad company knows that its employees are engaged in work on or about its tracks, it is its plain duty to maintain a careful lookout for such employees to prevent injuring them. Because the deceased had been employed by the railroad company for 22 years, a part of which time as foreman of a gang of men, and was aware of the many dangers incident to such employment, these facts did not authorize the railroad company to operate its engine and tender negligently and without regard to his safety or without using the ordinary care which an individual is obliged to use, under like circumstances, for the protection of his employees. The deceased had a right to presume that those operating the locomotive would use proper care and caution for his safety, that they would maintain a careful lookout to prevent injuring him, and that they would take the resonable, ordinary and usual precautions necessary to protect him in his employment. It cannot be claimed that under the Federal Employers' Liability Act an employee assumes the risks of the negligence of the employer or of the employer's employees or agents, at least until knowledge of the particular negligence which caused or was liable to cause the injury is brought to his attention."

The case of *Indiana, Illinois & Iowa R. R. Co.* v. *Olstat*, 212 Ill. 429, was decided prior to the enactment of the Federal Employers' Liability Act. Plaintiff was injured when struck by a locomotive backing along a track, without warning, as he was at work in the repair of this track. Defendant claimed there was no evidence

of its negligence, and that the plaintiff was guilty of contributory negligence, and had assumed the risk of injury from moving trains and engines. Plaintiff knew that the engineer in charge of this particular engine had frequently moved engines along the tracks there without sounding the whistle or ringing the bell, and defendant claimed that, knowing of this negligence on the part of the engineer, plaintiff assumed the risk of injury by reason of it. In affirming judgment for plaintiff, the court said (Opin. 434):

> "While appellee knew that Mumaw moved the engine through the yards with bell and whistle both silent, we do not think it can be said, *as a matter of law*, that he thereby assumed the risk that Mumaw would deliberately start an engine and run it upon men who he knew were working on the track at a point not more than two hundred feet from the starting place of the engine, without giving them any warning whatever."

Many other cases might be cited to the same effect, and the rule is so reasonable that we deem it unnecessary to quote from other authorities. How then, can it be said that the plaintiff, in the instant case, assumed the risk of this caboose movement when the locomotive engine attached to those cabooses started up from a position, according to defendant's conductor, Hudson, not over thirty-five feet away from where plaintiff was crossing, without sounding any warning or giving any signal of its approach, when plaintiff did not know or have a reason to believe such a negligent movement was about to be made? He could not assume the risk of defendant's negligence until he *knew* of that negligence, and *appreciated* the dangers arising by reason of it.

Defendant refers to the case of *Toledo, St. Louis & Western Railroad Co. v. Allen*, decided by this court on

February 20, 1928 (48 S. C. R. 215). In that case plaintiff was injured while at work as a car checker in a switching yard where trains were continually being made up and broken up. While checking cars down on one of a number of tracks over which cars were being continually shunted, he was struck by two cars moving by force of gravity without a rider and without any warning light upon them. There was no evidence of a custom and practice in that yard for the defendant to have a man upon cars so moved or a light upon them. There was no evidence of plaintiff crossing the tracks upon a much used and traveled way, as in the case at bar. The facts are so far different from the facts in the instant case that the decision is inapplicable.

(B) Defendant Was Negligent.

Having in mind the evidence heretofore reviewed, was defendant negligent in operating the locomotive engine that pulled the incoming freight train, in front of which plaintiff crossed, without dimming the bright headlight upon it as it came into the yard? Was defendant, in starting a caboose train on the next adjacent track without signal of any kind or without having a light at its foremost end or a man to keep a lookout and control its movements at a place where dozens of men crossed the tracks at all hours of the day and night, guilty of negligence? This was not in a switch yard where cars were continually shunted in on to switch tracks in making up or breaking up trains. There were two main line tracks and two lead tracks at the place where plaintiff crossed. He was injured, according to the scale of the diagram in evidence marked as Defendant's Exhibit I (R. 78), about one hundred to one hundred and twenty-five feet north of Irving Park boulevard where all of the witnesses testified employees crossed and re-crossed

at all hours of the day and night. Under the circumstances defendant owed a duty to give warning by signal of some kind of approaching caboose trains and to keep a lookout for these men, including plaintiff. The evidence heretofore reviewed showed specifically that it was the custom and practice to give such warning and to keep a man with a light on the foremost car or caboose moving along the track at that place.

In *Bombolis* v. *Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385 (affirmed 241 U. S. 211), it appears that plaintiff's intestate sustained fatal injuries while at work repairing a track. A freight train signaled its approach on one of the tracks and plaintiff's intestate stepped back near to another track, and was struck by a switch engine that approached without warning of any kind, according to plaintiff's evidence. Judgment for plaintiff was affirmed, the salient points applicable to the case at bar being stated as follows:

> "The negligence alleged and relied on is the failure of the switch engine crew to give the men working between the tracks a warning of its approach. No such warning was in fact given, or at least the jury was abundantly justified in so finding. There was testimony by at least four witnesses that it was the custom to give warning of the approach of a switch engine whenever there were men working on the track. *We think that the question whether the engineer of the switch engine was negligent in not ringing his bell as he approached these men was for the jury, and that the evidence sustains the verdict on this issue.* It is urged that the engineer ought not to have anticipated that the men working on the main track would take a position on or so near the lead track as to be in danger from the switch engine. But their work required them to be between the main track and the lead, the freight train was approaching on the main track, and the men

were getting out of its way. It is not going very far or imposing a very onerous duty to hold that the engineer should have rung the bell."

In *Philadelphia B. & W. R. Co.* v. *Tucker*, 35 App. D. C. 123 (affirmed without opinion 220 U. S. 608) it appears that plaintiff's intestate was fatally injured when struck by a train while crossing defendant's tracks along a pathway which had long been used by employees going to and from work. He was aware of the fact that trains and cars might move along these tracks at any time. In affirming a judgment in favor of plaintiff the court held that whether the defendant had provided a safe "*way*" for its employees was for the jury and that the long continued practice of employees in using this pathway over the tracks "was with the knowledge and consent of the defendant."

Under the Federal Employers' Liability Act upon which the instant suit is based the defendant is liable for any "defect or insufficiency" in its "ways" due to its negligence, and the pathway used by the plaintiff at the time he was injured was clearly a "way" within the meaning of the Federal Act.

In *Frazier* v. *Interstate Railroad Company*, 264 Fed. 96, the United States Court of Appeals, Fourth Circuit, passed upon a case where defendant's employee was killed while at work as a switchman in interstate commerce in defendant's yard. The accident happened in the night time, when, after making a coupling between two cars on a certain track, he stepped back upon an adjacent track and was struck by an engine with a freight car in front of it, which came upon him without warning, and without a light upon the car. The Circuit Court of Appeals said (Opin. 98):

"Both authority and reason are against the proposition that the crew of a switch train, or any other train, can be judicially declared as a matter of law to be without fault in running along an adjacent track under such conditions as here appear, without showing a light or sounding a bell or whistle or having a lookout. Upon proof of the allegations of the declaration, it will be for the jury to say whether the proximate cause of the casualty was solely negligence of the defendant, or of the plaintiff, or the two combined, or inevitable accident. Among the cases sustaining this conclusion we cite: *Norfolk & Western Ry.* v. *Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; *Chicago, Rock Island Ry.* v. *Wright*, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; *Erie R. R. Co.* v. *Purucker*, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166; *Toledo, St. L. & W. R. Co. et al.* v. *Bartley*, 172 Fed. 82, 96 C. C. A. 570; *Southern Ry. Co.* v. *Smith*, 205 Fed. 360, 123 C. C. A. 488; *Southern Ry. Co.* v. *Darnell's Admx.*, 114 Va. 312, 76 S. E. 291; *Harwick* v. *Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328. Reversed."

In *Delaware L. & W. R. Co.* v. *Hughes*, 240 Fed. 941, the United States Circuit Court of Appeals, Second Circuit, affirmed a judgment in favor of the administratrix of a deceased railroad switchman who was injured while at work as a switchman in defendant's yards. Plaintiff's intestate had had 25 years' experience as a switchman in the yard where he sustained his fatal injury and was thoroughly acquainted with the premises. He was hit by a moving car which plaintiff's evidence showed was "improperly managed in that there was no watchman at or near to its end with a signal lantern to warn those who had a right to be on the track of an approaching car." In holding the defendant negligent the court said that although the accident happened in the yard limits, "it was the duty of the defendant to give adequate warning